IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2007 Session

ELIZABETH MacRAE HODGE v. ROGER ALAN HODGE

Appeal from the Circuit Court for Davidson County
No. 01D-1954 Carol Soloman, Judge

No. M2006-01742-COA-R3-CV - Filed October 31, 2007

The parents of three minor children obtained a divorce, and a permanent parenting plan was approved in 2003. Two years after the foregoing judgments had become final – and without any petition being filed to invoke the court's jurisdiction over the final decrees previously rendered – the trial court entered a *sua sponte* Order appointing a Special Master to preside over what the order described as "a high conflict case between the parents over the love and affection of the minor children." The *sua sponte* Order afforded the Special Master exceptional powers, including the authority to modify the Permanent Parenting Plan and to resolve all conflicts between the parents arising out of the parenting plan. The Order included the directive that the Special Master's decisions were "effective as orders when made." We have determined the trial court lacked the right to exercise its jurisdiction because all matters previously in dispute had been fully adjudicated, the decrees previously rendered had become final judgments two years earlier, and neither party had filed the requisite petition (complaint) and summons to afford the trial court the right to exercise its "exclusive jurisdiction" over the domestic decrees it had previously entered. We, therefore, vacate the Order of Reference and any derivative orders arising therefrom.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated.

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

Phillip Robinson, Philip E. Smith, and Thomas F. Bloom, Nashville, Tennessee, for the appellant, Elizabeth Duncan MacRae Hodge.

Michael W. Binkley, Nashville, Tennessee, for the appellee, Roger Alan Hodge.

OPINION

In August, 2001, Elizabeth MacRae Duncan Hodge ("Mother") filed a divorce complaint in the Davidson County Circuit Court against Roger Alan Hodge ("Father"). Following a hotly contested trial, the Circuit Court filed an Order and Memorandum Opinion on August 1, 2002, granting Mother the divorce, dividing the marital assets, awarding Mother rehabilitative alimony,

and approving a permanent parenting plan. Mother was designated as the primary residential parent of the parties' three minor children, and Father was awarded visitation.

The August 2002 Order was followed by various motions to Alter or Amend the Order and other motions for relief.[1] The motions came on for hearing on September 6, 2002, and the trial court, *inter alia*, denied Mother's motion to obligate Father to pay the outstanding mortgage and Father's motion to modify visitation. Subsequently, Father filed a Motion to Appoint a Mediator. In March of 2003, the trial court entered an Order altering the parenting plan and further disposing of the parties' respective motions to alter or amend. The court also appointed a mediator to assist the parents to resolve future parenting conflicts. The March 2003 Order disposed of all pending motions. With no motions or issues remaining unresolved, the trial court entered an agreed Qualified Domestic Relations Order on June 10, 2003. No appeal was taken from the foregoing decrees.

On September 22, 2005, more than two years after the judgments were final, the trial court issued a *sua sponte* Order of Reference appointing a Special Master.[2] When the Order of Reference was issued, neither party had filed a pleading or summons nor had either party filed a Tenn. R. Civ. P. 60 motion for relief from a final judgment.

The Order of Reference bestowed exceptional powers on the Special Master. Pursuant to the Order, the Special Master was empowered to resolve all conflicts between the parents arising out of their inability to reach a compromise as to the details of the parenting plan in two ways. First, the Special Master was given the authority to meet with the parties and children to make *decisions* on basic day-to-day care issues regarding such things as visitation schedules, bedtime, diet, discipline, and health care management. The Special Master's decisions regarding these things were "effective as orders when made and will continue in effect unless modified or set aside by the Court." The order excused the Special Master from creating a written record or complying with the rules of evidence. Second, the Special Master was given the authority to make *recommendations*, as opposed to final decisions, which could later be adopted by the Court. The recommendations concerned issues such as private school education, church attendance, major visitation changes, and participation of parents and children in psychological examinations and psychotherapy. The Special Master was only required to make written recommendations and was excused from creating a record regarding the recommendations.

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[1]The various motions filed over the next five months included: (1) Mother's motion requesting the court to obligate Father to pay the outstanding second mortgage on the parties' residence in the amount of $47,000; (2) Father's Motion to Alter and Amend requesting, *inter alia*, modification of financial burdens and visitation with the children; (3) Father's Motion to Appoint a Mediator in October 2002; and (4) Father's Second Motion to Alter or Amend the Order of Memorandum Opinion in January 2003.

[2]The September 2005 Order read, "this is a high conflict case between the parents over the love and affection of the minor children [which] should be resolved by alternative means rather than a full and lengthy embattled court hearing."

Mother challenged the actions of the trial court on several grounds. On April 24, 2006, she filed a Tenn. R. Civ. P. 60 motion contending, *inter alia*, the trial court had erroneously authorized the Special Master to alter the parenting plan and to act without utilizing procedural safeguards, such as creating a record and following the rules of evidence. Mother also asserted that the Amended Order of Reference violated Tenn. S. Ct. R. 31, Section 7, which prohibits the use in judicial proceedings of evidence gathered in mediation proceedings. Mother further contended the appointment of Ms. Walden created a conflict of interest due to her prior work as the mediator of this matter.[3] She also contended the day-to-day control of her children was placed in the hands of a third party without the finding of a threat of harm to justify state interference. Mother further contended the appointment constituted an unauthorized and impermissible abdication of the trial court's responsibilities.

On July 5, 2006, Special Master Walden filed her report and recommendations, in which she recommended, *inter alia*, an increase in Father's visitation, a reduction in Father's child support obligation, and relief from Father's obligation to pay for private school tuition. On July 25, 2006, the court approved the report and recommendations of the Special Master, over Mother's objections, and denied Mother's Rule 60 motion.[4] This appeal followed.[5]

ANALYSIS

Although Mother raises several important issues concerning the propriety of the expansive powers bestowed upon the Special Master concerning the parenting of the parties' children, we are unable to consider the issues she presents. This is because a final decree was entered in 2003 that fully adjudicated the parties' rights with regard to their divorce, the permanent parenting plan, and all related issues. Once the judgment became final, the trial court no longer had the right to exercise jurisdiction over the matters formerly in dispute or parties thereto. Orders issued by a court without jurisdiction are void, and we are under an affirmative duty to vacate void orders without reaching

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[3] The obvious problem with the appointment of Ms. Walden as the Special Master is the fact Ms. Walden served as the mediator for the parties. Tennessee Supreme Court Rule 31, Section 10(c), expressly prohibits a mediator from also serving as a master in the same dispute. The Rules states: "During and following Rule 31 ADR Proceedings, Rule 31 Neutrals shall . . . [r]efrain from participation as attorney, advisor, judge, guardian ad litem, *master* or in any other judicial or quasi-judicial capacity in the matter which the Rule 31 ADR Proceeding was conducted." Tenn. S. Ct. R. 31, § 10(c) (emphasis added).

[4] On March 13, 2003, the trial court appointed Jan Walden, Esq., as a Rule 31 mediator to assist in solving any family or legal issues. Over the next two years, the parties availed themselves to the mediation services of Ms. Walden. On July 25, 2006, the court removed Ms. Walden and appointed another attorney in private practice to serve as the Special Master.

[5] Although our decision moots the issues raised by Mother, she contended on appeal that: (1) the court does not have the authority to appoint a Special Master who has the power to modify a parenting plan; (2) the court abused its discretion by failing to set aside the Order of Reference appointing the Special Master; (3) the report and recommendations of the Special Master must be rejected on account of the conflict of interest because Ms. Walden served as the court appointed mediator before serving as the Special Master.

the merits of the issues on appeal. Tenn. R. App. P. 13(b); *First American Trust Co. v. Franklin-Murray Dev. Co., L.P.*, 59 S.W.3d. 135, 141 (Tenn. Ct. App. 2001).

The record does not reveal what communication or event prompted the trial court to enter the *sua sponte* Order of Reference two years after the judgment was final; nevertheless, it is undisputed that neither party filed the requisite petition, complaint, summons or Tenn. R. Civ. P. 60 motion to invoke the trial court's jurisdiction. Although the reason for the trial court's sua sponte action is not apparent from the record, the trial court may have been operating under the mistaken belief that it had the unilateral right to modify the permanent parenting plan, which had become a final judgment without a party filing the requisite pleadings to invoke the court's jurisdiction.

This mistaken belief likely arises from the fact that jurisdiction to modify or alter a parenting plan remains in "the *exclusive control* of the court that issued such decree." Tenn. Code Ann. § 36-6-101(b) (emphasis added). As the statute clearly provides, the trial court which enters a domestic decree such as a permanent parenting plan concerning a minor child retains "exclusive control" for the purpose of modification of the decree. *See Cunningham v. Cunningham,* No. M2006-01187-COA-R3-CV, 2007 WL 1259209, at*5 (Tenn. Ct. App. April 30, 2007) (citing Tenn. Code Ann. § 36-6-101(b)); *see also Shepherd v. Metcalf,* 794 S.W.2d 348, 351 (Tenn. 1990); *Mayhew v. Mayhew*, 376 S.W.2d 324, 328 (Tenn. 1963); *Talley v. Talley*, 371 S.W.2d 152, 157 (Tenn. 1962). Because of the "exclusive control" provision afforded by Tenn. Code Ann. § 36-6-101(b), no court other than the court entering the initial domestic decree may modify the decree.[6] *Snodgrass v. Snodgrass*, 357 S.W.2d 829, 833 (Tenn. 1962).

The fact a domestic court retains "exclusive control" over domestic decrees such as parenting plans and child support, however, does not deprive the domestic decrees, once final, of the quality of finality or the principles of *res judicata*. *See Damron v. Damron*, 367 S.W.2d 476, 480 (Tenn. 1963). As we have often stated, until a judgment becomes final, it remains within the trial court's control and may be modified by the trial court any time prior to the entry of a final judgment. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999) (citing *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 328 (Tenn. 1982)). Once a judgment concerning a permanent parenting plan or child support decree becomes a final judgment, however, the trial court loses the right to exercise control over it due to the fact the judgment is final for the purpose of appeal and final as *res judicata* upon the facts then existing. *See Hicks v. Hicks*, 176 S.W.2d 371, 374-75 (Tenn. 1943); *Darty v. Darty*, 232 S.W.2d 59, 62 (Tenn. Ct. App. 1949).

Although the trial court retains "exclusive control" over the domestic decrees it entered in what have become final judgments, the trial court loses "the right to exercise" its exclusive control

[6] Exceptions to the exclusivity provision are found in The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), codified at Tennessee Code Annotated §§36-6-201 through 243 (2001), which governs jurisdiction between Tennessee and other states over child custody proceedings. *Button v. Waite*, 208 S.W.3d 366, 369 (Tenn. 2006).

over the "closed domestic relations file"[7] unless and until a party "takes the steps to invoke the court's jurisdiction." *See Levy v. Board of Zoning Appeals,* No. M1999-00126-COA-R3-CV, 2001 WL 1141351, at *4 (Tenn. Ct. App. Sep. 27, 2001) (citing *Randolph & Jenks v. Merchants' Nat'l Bank*, 77 Tenn. 63, 68 (1882)).

This important principle is explained in *Levy v. Board of Zoning Appeals*, which arose out of a challenge to the action taken by a local board of zoning appeals:

> Parties seeking judicial review of a local board's decision must take the steps required to invoke the court's jurisdiction. *See Randolph & Jenks v. Merchants' Nat'l Bank*, 77 Tenn. 63, 68 (1882) (holding that "[i]t is an elementary principle that the courts can only act upon such matters as are properly brought before them by the parties, according to the settled law, practice and usage"). As one party has put it, *"The jurisdiction and power of a court remain at rest until called into action by some suitor; it cannot by its own act institute a proceeding sua sponte. The action of a court must be called into exercise by pleading and process . . . by some suitor . . . requesting the exercise of the power of the court*." Timothy Brown, *Commentaries on the Jurisdiction of Courts* § 2a (2d ed. 1901).

Levy, 2001 WL 1141351, *4 (emphasis added).

In this matter, the trial court entered a final judgment in 2003 that fully and completely defined the parties' rights with regard to the issues presented, leaving nothing else for the trial court to do. *See Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999). Prior to the entry of the final decree in 2003 – before an order that adjudicated all of the claims or the rights and liabilities of the parties to the action – the trial court retained the jurisdiction to revise the orders at any time before entry of a final judgment adjudicating all claims, rights, and liabilities of all parties. *Id.*, at 827-28 (citing Tenn. R. App. P. 3(a)). Thus, once the 2003 judgment became final, the jurisdiction of the trial court remained at rest until called into action by one of the parties, and the trial court was without authority to institute a proceeding *sua sponte*. *See Levy*, 2001 WL 1141351, at *4.

There are presently two ways to invoke the trial court's jurisdiction over final judgments previously rendered by the trial court in a domestic action. One is to file a petition along with a "proposed parenting plan," as mandated by Tenn. Code Ann. § 36-6-405, and summons. [8] The other

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[7] "Closed domestic relations file" is the term used by the Supreme Court to identify a former domestic relations case for which the judgement has become final. *See* (2008 proposed) Rule 7A, Tennessee Rules of Civil Procedure; see also the Commission Comment to proposed Rule 7A.

[8] This procedure is subject to being changed if proposed Rule 7A of the Tennessee Rules of Civil Procedure is officially adopted in 2008. At common law, actions to modify domestic orders that had become final judgments were commenced by petitions. *See* 2008 Advisory Commission Comment to proposed Rule 7A, Tennessee Rules of Civil Procedure. However, in October of 2007, the Supreme Court proposed a new Rule of Civil Procedure, Rule 7A.02, that pertains to efforts to modify a final judgment in a "closed domestic relations case" in which an order or judgment has (continued...)

is to file a Tenn. R. Civ. P. 60 motion. Thus, to awaken the trial court's jurisdiction from this period of rest, one of the parties had to file a petition (or complaint) for modification along with a proposed parenting plan pursuant to Tenn. Code Ann. § 36-6-405, or a Rule 60 motion for relief from the judgment.[9] *See Levy,* 2001 WL 1141351, *4. Neither party filed the requisite petition and process or Rule 60 motion to request the trial court to exercise its power of exclusive jurisdiction, and therefore, the trial court was without jurisdiction to take any action that constituted a modification of the permanent parenting plan incorporated in the 2003 final judgment.

IN CONCLUSION

We, therefore, vacate the Order of Reference and all orders entered by the trial court thereafter and remand with instruction for the trial court to enter an order returning the parties to the status that existed immediately prior to the entry of the Order of Reference. Costs of appeal are assessed against Appellee, Roger Alan Hodge.

FRANK G. CLEMENT, JR., JUDGE

[8](...continued)
become final. The rule states that "an action to modify said order under the court's continuing jurisdiction, such as an effort to modify custody, alimony or child support, and an action to enforce an order or judgment, such as a request for an adjudication of contempt, *shall be commenced by filing a complaint* under the same file number as the prior order, *accompanied by a summons, as provided in Rule 4*." (Proposed) Tenn. R. Civ. P. 7A (2008)(emphasis added). The proposed rule also provides that service shall be made on the defendant, rather than the prior attorney of record and that petitions shall not be used. The commission comment states that proposed Rule 7A will not affect Tenn. R. Civ. P. 60 practice.

[9]Under limited circumstances, the trial court would have jurisdiction to entertain a Tenn. R. Civ. P. 60 motion filed by one of the parties seeking relief from a final judgment. *See* Tenn. R. Civ. P. 60. Relief under Rule 60.02 is considered "an exceptional remedy." *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn. 1992). The function of Rule 60.02 is "to strike a proper balance between the competing principles of finality and justice," *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976), and it operates as "an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Thompson v. Fireman's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990).